(1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

BUSINESS PLANNING SYSTEMS, INC.,

Petitioner,

v.

PERSONNEL DECISIONS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Delaware

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the decision of the Supreme Court of Delaware is in direct conflict with *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Preston v. Ferrer*, ___ U.S. ___, 128 S.Ct. 978 (2008).

(2) Whether a State law restriction on arbitration may be imposed on an agreement in interstate commerce absent a written or oral agreement governing application of State, rather than federal, law to the arbitration proceedings.

(3) Did the State court err in applying State law based on its subjective analysis of the parties' conduct, and a balancing of equities, in light of a strong presumption that the Federal Arbitration Act applies to agreements in interstate commerce?

CORPORATE DISCLOSURE STATEMENT

There is no parent of Business Planning Systems, Inc., and no publicly held company owning 10% or more of the stock of Business Planning Systems, Inc.

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OPINIONS BELOW

This action was initiated on September 7, 2007, in the Chancery Court for Sussex County, Delaware, by Respondent's filing of a complaint to enjoin Petitioner from proceeding in an arbitration pending before the American Arbitration Association ("AAA"). The injunction was sought under the provisions of the Delaware Uniform Arbitration Act, 10 *Del. C.* § 5701, *et seq.* ("DUAA"). Petitioner moved the Chancery Court to dismiss the complaint and deny Respondent's motion for a preliminary injunction. By a Memorandum Opinion dated May 5, 2008, the Chancery Court granted Respondent's motion for preliminary injunction, enjoined the arbitration, and denied Petitioner's motion to dismiss. *Personnel Decisions, Inc. v. Business Planning Systems, Inc.*, 2008 Del. Ch. LEXIS 55 (2008). The Memorandum Opinion is reprinted in Appendix, App. 2-38. Without further consideration, the Chancery Court entered a permanent injunction on August 18, 2008. Petitioner appealed issuance of the injunction to the Supreme Court of the State of Delaware. The Supreme Court of Delaware, by Order dated March 17, 2009, affirmed for the reasons set forth in the Chancery Court's Memorandum Opinion. *Business Planning Sys. v. Pers. Decisions, Inc.*, 2009 Del. LEXIS 140 (2009). The Order is reprinted in Appendix, App. 1.

BASIS FOR JURISDICTION IN THIS COURT

This action was filed in the Chancery Court for Sussex County, Delaware. The court enjoined Petitioners from proceeding in an arbitration against Respondents. Petitioner timely appealed to the Supreme Court of Delaware. The Supreme Court of Delaware affirmed the Chancery Court by Order dated March 17, 2009. This Petition is timely filed under Supreme Court Rule 13(1), and this Court has jurisdiction pursuant to 28 U.S.C. § 1257(1).

Pursuant to Supreme Court Rule 14(e), Petitioner provides the following specific information:

(i) Date the judgment or order sought to be reviewed was entered:

March 17, 2009, by the Supreme Court of Delaware.

(ii) Date of any order respecting rehearing/ extension of time:

Not applicable to this Petition.

(iii) Rule 12.5 considerations:

Not applicable to this Petition.

(iv) Statutory provision conferring jurisdiction:

28 U.S.C. § 1257(1).

(v) Rule 29.4 statement:

Not applicable to this Petition.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

9 U.S.C. § 2:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

10 *Del. C.* § 5702(a):

Jurisdiction of the Court; applications to the Court – The term "Court" means the Court of Chancery of this State, except where otherwise specifically provided. The making of an agreement described in § 5701 providing for arbitration in this State confers jurisdiction on the Court to enforce the agreement under this chapter and to enter judgment on an award thereunder, except as provided in § 5718. Action shall be commenced by an initial complaint and shall be heard in the manner and upon the notice provided by law or rule of court on any civil action. Notice of an initial complaint shall be served in the manner provided by law for the service of summons in an action.

10 *Del. C.* § 5702(c):

Limitation of Time. If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the State, a party may assert the limitation as a bar to the arbitration on complaint to the Court as provided in § 5703(b) or by way of defense in an existing case. The failure to assert such bar through complaint to the Court or by way of a defense in Court shall not preclude its assertion before the arbitrators, who may, in their sole discretion, apply or not apply the bar. Except as provided in § 5714(a)(5) such exercise of discretion by the arbitrator shall not be subject to review by a court on a complaint or on an application in an existing case to confirm, vacate or modify the award.

10 *Del. C.* § 5703(c):

Notice of intention to arbitrate. A party must serve upon another party a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to enjoin the arbitration within 20 days after such service such party shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in Court the bar of a limitation of time. Such notice should be served in

the same manner as a summons or by registered or certified mail, return receipt requested. A complaint seeking to enjoin arbitration must be made by the party served within 20 days after service of the notice or the party shall be so precluded.

10 *Del. C.* § 5703(b):

Subject to subsection (c) of this section, a party who has not participated in the arbitration and who has not made or been served with an application may file its complaint with the Court seeking to enjoin arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation of § 5702(c).

STATEMENT OF THE CASE

Petitioner Business Planning Systems, Inc. ("BPS") develops and licenses computer software products from its offices in Rehoboth Beach, Delaware. Respondent Personnel Decisions, Inc. ("PDI") is located in Minneapolis, Minnesota; its business activities include the design and marketing of pre-employment screening tests that predict, for an employer, a potential employee's job performance. The parties entered into a Development and Marketing Agreement (the "Agreement") on or about June 15, 1998, for the purpose of developing and maintaining a computer program to administer and score pre-employment tests.

The Agreement contains a broadly worded arbitration clause that provides for the submission of disputes to an arbitrator:

> PDI and BPS agree that any dispute that cannot be amicably resolved within 30 days will be submitted to and resolved by arbitration. In this event, the parties will agree upon a neutral arbiter who has significant experience with software issues, or will request that an appropriate arbiter be selected from a list of qualified individuals by the American Arbitration Association. Any decision of the arbiter will be binding and shall be enforceable by a court of competent jurisdiction.

Notably, the Agreement does not require that the arbitration must convene in Delaware: nor was there any written or oral agreement between the parties to use Delaware (or any other) state law to govern the arbitration.

A dispute arose between the parties in May 2000. As the disagreement dragged on BPS served notice of its intent to arbitrate on March 19, 2003, and, again, on July 1, 2003. Under the subheading "Procedures" both notices stated:

> Paragraph 23 of the Agreement provides 30 days for amicable resolution of the foregoing dispute before submission to binding arbitration. The undersigned is prepared on behalf of BPS to attempt a prompt and amicable resolution of this matter, with PDI, within

> the pre-arbitration timeframe specified. If this matter remains unresolved after 30 days from your receipt of this letter, BPS will file copies of this Demand with the American Arbitration Association ("AAA") at its Regional Office in Washington, D.C., with the request that it commence the administration of the arbitration under AAA Commercial Arbitration Rules, including Optional Rules for Large, Complex Commercial Dispute. We will request appointment of a single arbitrator – someone who has significant experience with software development, marketing and royalty issues – selected in accordance with Commercial Arbitration Rule 13. Under the rules, you may file an answering statement within fifteen days after notice from the AAA.

Both notices referred PDI to § 5703(c) of the DUAA. Section 5703(c) provides that a party served with an arbitration demand must assert a time limitation defense in Chancery Court, within 20 days of service, or the matter is subject to the arbitrator's discretion. 10 *Del. C.* §§ 5703(c) and 5702(c). Nevertheless, by its terms, the DUAA limits intervention by the Chancery Court to agreements that specify that the arbitration is to occur within Delaware. 10 *Del. C.* § 5702(a).

BPS served a Demand for Arbitration on PDI and filed it with the AAA on August 10, 2007. App. 39-40. The Demand for Arbitration sought administration of the arbitration under the AAA's Commercial Rules. App. 39, 40. BPS proposed Delaware as the location of

the arbitration in its AAA Demand (which differed from its earlier notices), but PDI filed a Response to the AAA on August 30, 2007, and vehemently objected to conducting the arbitration in Delaware; proposing instead that the arbitration be convened in Minnesota.

PDI then filed a complaint in the Delaware Court of Chancery and sought to enjoin arbitration pursuant to 10 *Del. C.* § 5702(c) and § 5703(b). BPS moved to dismiss PDI's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The Court of Chancery granted PDI's motion for preliminary injunction and denied BPS' motion to dismiss in its Memorandum Opinion of May 5, 2008. App. 2-38. Without further consideration, the Chancery Court entered a permanent injunction on August 18, 2008. Petitioner appealed issuance of the injunction to the Supreme Court of the State of Delaware. The Supreme Court of Delaware, by Order dated March 17, 2009, affirmed for the reasons set forth in the Chancery Court's Memorandum Opinion.

REASONS FOR GRANTING THE WRIT

The Court should grant the Petition to resolve a conflict between a decision of the highest court in Delaware and decisions from this Court over whether a State's arbitration act is preempted by conflicting provisions of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*.

(a) The Supreme Court of Delaware's decision conflicts with *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Preston v. Ferrer*, __ U.S. __, 128 S.Ct. 978 (2008).

The Chancery Court applied the terms of the DUAA to the Agreement, even though the Agreement is in interstate commerce and does not provide for arbitration in Delaware, as required by the DUAA. App. 2-38. There was no written or oral agreement between the parties to use State law to govern the arbitration. The question of whether the DUAA may be applied to an agreement in interstate commerce, which does not provide for arbitration within Delaware, was actually raised by the Chancery Court. App. 12-13. BPS argued against application of the DUAA because the parties never indicated a mutual consent to arbitrate within Delaware, as required by the statute. App. 12-13. Nevertheless, based on what it discerned from the parties' course of performance, and a balancing of equities against BPS, the Court of Chancery concluded that the DUAA applied and intervened to enjoin the arbitration. App. 14-17; 21-23. The Chancery Court recognized that in the absence of "clear evidence" that the parties intended the

DUAA to control, application of §§ 5702(c) and 5703(c) is preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq*. App. 20-21, n. 37. See *Application of Prudential Secs. Inc.*, 205 A.D.2d 424, 425 (N.Y. App. Div. 1994) (holding that nearly identical NY statutory provisions, 74 N.Y. CPLR §§ 7502(b) & 7503(c) (2009), were preempted by the FAA). The Agreement contemplates a transaction in interstate commerce between entities located in Delaware and Minnesota. It contains a broad arbitration clause wherein the parties agree to arbitrate "any dispute." Under the FAA, "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2009). The Agreement does not specify that arbitration shall occur in Delaware, or that the DUAA shall apply. The Chancery Court acknowledged that the "record of communications and tussle after my letter . . . [which questioned the applicability of the DUAA] . . . establishes that the parties never agreed to arbitrate in Delaware." App. 13. Accordingly, under the provisions of the DUAA, which limits judicial intervention to agreements "providing for arbitration" in Delaware (10 *Del. C.* § 5702(a)), the restriction on arbitration contained in the act, *i.e.*, an injunction based on a time limitation defense, was not available to PDI.

The FAA, which rests on Congress' authority under the Commerce Clause, establishes a national policy favoring arbitration when the parties contract for the mode of dispute resolution. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). The FAA "supplies not simply a procedural framework applicable to federal courts; it also calls for the application in state as well as federal courts, of federal substantive law regarding arbitration." *Preston v. Ferrer*, __ U.S. __, 128 S.Ct. 978, 981 (2008) (holding that when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, judicial or administrative, are superseded by the FAA).

This Court has stated that the FAA "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995). The FAA's displacement of conflicting state law is now "well-established" and "repeatedly reaffirmed" by this Court. *Ferrer*, at 983; *Allied Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, 272 (1995); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 684-85 (1996); *Perry v. Thomas*, 482 U.S. 483, 489 (1987).

Because of the strong presumption that a contract in interstate commerce should proceed under the rules of the FAA, contracting parties who choose to proceed under state or other rules must clearly

evidence their intent to be bound by such rules. See *Mastrobuono*, at 61-62; *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293-300 (3d Cir. 2000) (stating that parties must evidence a "clear intent" to incorporate state law rules for arbitration); *Jacada, Ltd. v. Int'l. Mktg. Strategies, Inc.*, 401 F.3d 701, 710-12 (6th Cir. 2005). As emphasized by the Chancery Court, "no provision in the [Agreement] specifies which arbitration act applies to the agreement . . . " App. 14. The court's finding that the absence of such a provision means there is no conflict with application of the DUAA, ignores the presumption that the FAA applies to an agreement in interstate commerce unless the parties clearly agree otherwise. The "strong default presumption" is that the FAA, not state law, supplies the rules for arbitration. *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002) citing *Mastrobuono*, at 61-62.

The Chancery Court did not give proper weight to the strong presumption in favor of the FAA in finding that the parties assented by reason of a course of correspondence that is both equivocal and contradictory to arbitrate under the DUAA. In fact, at no single point in time did BPS and PDI mutually consent to arbitrate in Delaware and thus, even arguably, subject themselves to the DUAA. App. 13. Even though BPS served notices in accordance with the DUAA, it also referred to administration under the rules of the AAA in those notices. And, later, PDI did not object to the application of the AAA's commercial

rules in responding to the AAA Demand filed by BPS on August 10, 2007.

Since the Agreement refers to the AAA's rules for purposes of selecting an arbitrator, and both parties actually accepted the AAA rules, it may be rationally inferred that the parties contemplated that the arbitration would be administered under the AAA's rules. The AAA's rules provide that the arbitrator shall rule on the arbitrability of any claim. (AAA Commercial Arbitration Rule 7 – Jurisdiction). In *Ferrer*, this Court ruled that reference to the AAA rules in an arbitration agreement negates a state's "special rules of limiting the authority of arbitrators." *Ferrer*, at 989. Accordingly, the special rules contained in §§ 5702(c) and 5703(c), which limit the authority of an arbitrator to resolve the arbitrability issue of timeliness are preempted by the FAA under the facts of this case where there is no clear and unequivocal assent by the parties to eschew the FAA in favor of the DUAA.

Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. See *Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 476 (1989). This is true whether the issue is "construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* citing *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). PDI's claim that the arbitration is time barred is a matter of arbitrability, and is properly decided by the arbitrator, rather than a court. The rulings of

the State courts below threaten to erode the general applicability of federal substantive law to arbitration agreements involving interstate commerce. See 9 U.S.C. § 2 (2009).

(b) The balance of equities test engaged in by the Chancery Court conflicts with the broad mandate of the FAA and ignores Respondent's remedy at law.

The Chancery Court's imposition of a State law limitation on arbitration based on the balancing of equities against BPS conflicts with the "general applicability" of the FAA and the strong policy favoring arbitration set forth in the FAA and this Court's precedent. See *Southland*, 465 U.S. at 10. Moreover, allowing a state court to balance equities to determine whether state or federal law governs an arbitration conflicts with the federal policy favoring application of the FAA. Since PDI's claims are properly committed to arbitration under the FAA, an adequate remedy at law exists. *McMahon v. New Castle Assocs.*, 532 A.2d 601, 603 (Del. Ch. 1987). PDI may raise the statute of limitations as a bar in arbitration. *Paine Webber Inc. v. Elahi*, 87 F.3d 589, 593, 599 (1st Cir. 1996). Because PDI has an adequate remedy at law, it is not prejudiced by enforcement of the FAA in this case.

CONCLUSION

The conflict between the Supreme Court of Delaware and the decisions of this Court, as to whether provisions in the DUAA allowing judicial intervention in an arbitration are preempted by the FAA, threatens the FAA's uniform application to agreements in interstate commerce. The conflict creates confusion about the established precedent relating to the FAA's preemption of inconsistent provisions in State law. This Court should grant the Petition and resolve the conflict.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF DELAWARE

BUSINESS PLANNING SYSTEMS, INC.,	§	No. 473, 2008
Defendant Below, Appellant,	§	Court Below: Court of Chancery of the State of Delaware, in and for Sussex County
v.	§	
PERSONNEL DECISIONS, INC.,	§	
Plaintiff Below, Appellee.	§	C.A. No. 3213

Submitted: March 4, 2009
Decided: March 17, 2009

Before **BERGER, JACOBS** and **RIDGELY,** Justices.

ORDER

This 17th day of March, 2009, having considered the briefs and arguments of the parties, it appears to the Court that the decision of the Court of Chancery should be affirmed on the basis of its analysis of the parties' course of conduct, and its analysis of the relevant statutes, as set forth in the Memorandum Opinion dated May 5, 2008.

NOW, THEREFORE, the judgment of the Court of Chancery be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

PERSONNEL DECISIONS, INC., a Minnesota corporation,	)	
Plaintiff,	)	
v.	)	C.A. No. 3213-VCS
BUSINESS PLANNING SYSTEMS, INC., a Delaware corporation,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: February 14, 2008
Date Decided: May 5, 2008

Daniel V. Folt, Esquire, DUANE MORRIS LLP, Wilmington, Delaware; Patrick J. Loftus, Esquire, DUANE MORRIS LLP, Philadelphia, Pennsylvania, *Attorneys for Plaintiff.*

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STRINE, Vice Chancellor.

I. Introduction

In this case, I apply the terms of the Delaware Uniform Arbitration Act ("DUAA") to an arbitration agreement in interstate commerce, when the arbitration agreement does not provide for arbitration in Delaware as that Act requires. I reach this result because the parties unambiguously demonstrated through the course of performing their arbitration agreement that they believed they had entered an agreement subject to the DUAA, and because the party that first invoked that statute is estopped to deny its application. The litigants' shared belief that the DUAA applied was so strong that the parties failed to realize it did not apply by its own terms until the court sent an inquiring letter after the close of briefing on this motion. Because neither Delaware public policy nor the Federal Arbitration Act ("FAA") preclude parties from voluntarily choosing to use the DUAA, I resolve the underlying dispute in accordance with the statutory provisions of the DUAA. That dispute involves a question of statutory interpretation.

In 2003, defendant, Business Planning Systems, Inc., sent two notices of intention to arbitrate to the plaintiff in this case, Personnel Decisions, Inc. At that time, Personnel Decisions did not believe the breach of contract claims underlying those notices were time-barred, as they dealt with a contract dispute involving events that took place in 2000. But Business Planning waited until 2007 – some four years later – to file the arbitration equivalent of a complaint, a

demand, and take the necessary steps to begin the arbitration process in earnest. That was more than seven years after the alleged breaches of contract. Personnel Decisions responded to the demand by filing this action under §§ 5702(c) and 5703(b) of the DUAA, seeking to enjoin the arbitration because it argues Business Planning's contract claims were time-barred when the demand was sent. Under those sections of the DUAA, a party to an arbitration agreement may sue to enjoin an arbitration on the ground that the claims sought to be arbitrated were time-barred at the time a demand was made or a notice of intention to arbitrate was sent. But Business Planning contends that another section of the DUAA, § 5703(c), precludes this suit because Personnel Decisions did not sue within 20 days after receiving the notices of intention to arbitrate in 2003.

In this opinion, I reject Business Planning's argument that Personnel Decisions was required to raise its limitation defenses in 2003 when the notices of intention to arbitrate were filed or lose any ability to seek an injunction. Business Planning's argument exploits a statutory ambiguity to create a "gotcha" opportunity for indolent plaintiffs. By its reading, a torpid claimant can file a premature notice when it is not prepared to go to arbitration, sit on its demand until the statute of limitations is well expired, and then claim that the premature notice cut off the respondent's §§ 5702(c) and 5703(b) right to seek an injunction if the claimant's case was time-barred when the demand is finally made. I refuse to

interpret the relevant statutory provisions in that way because doing so would undercut the General Assembly's predominant purpose in enacting the unique provisions of §§ 5702 and 5703 – giving arbitration respondents a fair opportunity to seek an injunction against the arbitration of time-barred claims.

II. Factual Background

Personnel Decisions and Business Planning executed a Development and Marketing Agreement (the "Development Agreement") on June 15, 1998 that contained an arbitration clause.[1] The arbitration clause stated that:

> [Personnel Decisions] and [Business Planning] agree that any dispute that cannot be amicably resolved within 30 days will be submitted to and resolved by arbitration. In this event, the parties will agree upon a neutral arbiter who has significant experience with software issues, or will request that an appropriate neutral arbiter be selected from a list of qualified individuals by the American Arbitration Association.[2]

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[1] Compl. Ex. A ("Agreement") ¶ 1.

[2] Agreement ¶ 23. Although the Development Agreement contemplated the AAA choosing an arbitrator in some circumstances, it did not reference the AAA Rules.

Because Personnel Decisions was a Minnesota corporation with its offices in Minneapolis and Business Planning was a Delaware corporation with its offices in Delaware, the Development Agreement fell in the stream of interstate commerce. This meant the FAA would govern the agreement[3] unless the parties instead contracted to apply the DUAA.[4] But the parties failed to scrutinize those intricacies, which in any event would only be important if a situation arose implicating one of the few instances in which those statutes materially differ. The Development Agreement required the application of Delaware substantive law, but it did not address which arbitration act governed the Development Agreement.[5] Nor did it require arbitration in Delaware, the statutory trigger for applying the DUAA.[6]

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[3] 9 U.S.C. §§ 1, 2 (stating FAA applies to agreement to arbitrate implicating interstate commerce); *see also SBC Interactive, Inc. v. Corporate Media Partners,* 1998 WL 749446, at *4 (Del. Ch. Oct. 7, 1998) (holding the Court of Chancery has equitable jurisdiction to apply the FAA to an agreement to arbitrate in interstate commerce).

[4] *See Volt Info. Sciences, Inc. v. Bd. of Trustees,* 489 U.S. 468 (1989) (allowing parties to contract for application of state arbitration act rules inconsistent with the FAA in an agreement to arbitrate in interstate commerce); *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 61-62 (1995) (same).

[5] Agreement ¶ 20.

[6] 10 *Del. C.* § 5702(a) ("The making of [a written agreement to arbitrate a dispute] *providing for arbitration in this State* confers jurisdiction on the Court to enforce the agreement under this chapter. . . .") (emphasis added).

A. Business Planning Initiates Arbitration Under The DUAA And Four Years Later The Parties Brief Arguments On How The DUAA Should Be Interpreted

Nearly five years after the Development Agreement was executed, Business Planning sent Personnel Decisions a March 19, 2003 notice of intention to arbitrate (the "First Notice"), which claimed that Personnel Decisions had breached the Development Agreement.[7] According to Business Planning, Personnel Decisions had breached its obligation to use "reasonable efforts" to market software developed by Business Planning "[b]y May 2000," and had breached a no-assignment clause in the autumn of 2000 when it assigned some or all of its contract obligations to a third party.[8] There was little green left on these bananas; depending on the precise date of the first alleged breach, the limitations period would soon expire.[9]

Although the Development Agreement did not expressly select the DUAA or meet its triggering term by calling for arbitration of disputes within Delaware, Business Planning unambiguously invoked the DUAA in the First Notice. It warned Personnel Decisions that it would lose certain rights to judicial review

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[7] Compl. Ex. B.

[8] *Id.*

[9] *See* 10 *Del. C.* § 8106. Business Planning did not provide the exact date of the alleged breach in that letter. *See* Compl. Ex. B.

under § 5703(c) of the DUAA if it did not respond within 20 days. But Personnel Decisions would not have had any such rights to lose in the first place unless the DUAA applied to the Development Agreement. Unlike the FAA, the DUAA permits a party to seek an injunction against arbitration if "at the time the demand for arbitration was made *or* a notice of intention to arbitrate was served": 1) a valid arbitration agreement was not made; 2) the agreement had not been complied with; or 3) "the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in [court]."[10] For its part, as we shall see, § 5703(c) allows a claimant to file a notice of intent to arbitrate meeting certain standards and thereby force a respondent to seek an injunction based on these defenses within 20 days or lose the right to seek pre-arbitration judicial review.

By expressly referencing this unique provision of Delaware law, Business Planning obviously invoked the DUAA and signaled its belief that it governed disputes under the Development Agreement. Invoking the § 5703(c) language also makes no practical sense under the FAA, because that statute does not enable parties to go to court, rather than the

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[10] 10 *Del. C.* § 5702(c) (emphasis added); *see, e.g.*, 9 U.S.C. § 1, *et seq.* (2008) (containing no comparable provision); *see also* UNIF. ARBITRATION ACT, 7 U.L.A. § 1, *et seq.* (1956) (same); UNIF. ARBITRATION ACT, 7 U.L.A. § 1, *et seq.* (2000) (same); *Dresser Indus., Inc. v. Global Indus. Tech., Inc.*, 1999 WL 413401, at *5 n.5 (Del. Ch. June 9, 1999) (noting the unusual nature of § 5702(c)).

arbitrator, with a defense that a claim is time-barred or that the underlying contract is invalid.[11] Under the FAA, those defenses go to the arbitrator in the first instance.[12]

In the correspondence that followed, neither party disputed Business Planning's contention in the First Notice that the DUAA required prompt action for Personnel Decisions to preserve judicial review of limitations defenses. Business Planning continued to invoke the DUAA. For example, when Business Planning sent a second notice of intention to arbitrate (the "Second Notice") on July 1, 2003, it contained an identical paragraph regarding § 5703(c) of the DUAA that warned Personnel Decisions of the consequences under the DUAA if it did not act to protect its rights.[13]

In contrast to Personnel Decisions' prompt July 15, 2003 response,[14] Business Planning took a torpid

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[11] Additionally, the language used in the First and Second Notices was quite similar to language suggested by a leading treatise for use with a nearly identical statutory scheme contained in New York's arbitration act. *Compare* Compl. Ex. B *with* LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 18:7, at 18-12 (3d ed. 2007); *compare* 10 *Del. C.* §§ 5702(c) & 5703(c) *with* 75 N.Y. CPLR §§ 7502(b) & 7503(c).

[12] *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (finding that a similar arbitration clause meant "the applicability of . . . [a] time limit rule [wa]s a matter presumptively for the arbitrator, not for the judge"); *see also Brown v. T-Ink, LLC*, 2007 WL 4302594, at *1, *12 (Del. Ch. Dec. 7, 2007).

[13] Compl. Ex. C.

[14] Compl. Ex. D.

approach to initiating arbitration. It was silent for over four years. In other words, Business Planning took no action to prosecute the arbitration or otherwise resolve the dispute until August of 2007 when it filed a Demand for Arbitration (the "AAA Demand") with the American Arbitration Association ("AAA") on August 10, 2007.[15] This was four years after it first notified Personnel Decisions of the alleged breaches and seven years after the alleged breaches themselves. In that AAA Demand, Business Planning for the first time requested Delaware as the location for the arbitration.[16]

Personnel Decisions filed its own action in this court on September 7, 2007 seeking, under authority of §§ 5702(c) and 5703(b) of the DUAA, an injunction against the arbitration on the grounds that Business Planning's claims were barred by the statute of limitations and laches (for ease of reference, the "Limitations Defenses"). Personnel Decisions moved for a preliminary injunction. In response, Business Planning moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim. Business Planning contends that § 5703(c) precludes Personnel

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[15] The parties disagree over when the Demand for Arbitration was filed. Personnel Decisions places it on August 8, 2007. Business Planning places it on August 14, 2007. Even the forms disagree on that date, ranging from August 10, 2007 ("Demand for Arbitration: Statement of Claim") to August 14, 2007 ("Commercial Arbitration Rules: Demand for Arbitration").

[16] *See* Compl. Ex. D. It had previously mentioned only Washington, D.C.

Decisions from asserting the Limitations Defenses in court because Personnel Decisions did not file a complaint within 20 days of the First or Second Notice, even though these defenses were not ripe at that time.

The parties fully briefed the motion to dismiss, both assuming that the DUAA applied.

B. After The Court Sends A Letter, The Parties React To The Unforeseen Possibility The DUAA Does Not Apply

In reviewing the Development Agreement in response to their papers, I recognized that the Development Agreement did not meet the literal requirements of the DUAA. Being chary about deciding the case in a dispute where I had a question about which statute applied, I asked the parties in advance of oral argument to submit letters explaining which arbitration act applied – the DUAA or the FAA.

After receiving the court's letter, the parties for the first time appreciated the importance that the location of arbitration might play in resolving this dispute. Both realized that their respective arguments over the proper location for the arbitration – which until then were motivated solely by cost and convenience – undercut their respective objectives in this litigation.

This reality put Personnel Decisions in an especially tough spot. It had argued that any

arbitration should take place in Minnesota, near its headquarters.[17] The convenience of a nearby arbitration now conflicted with its desire for judicial review, but Personnel Decisions chose to abandon seeking the former in favor of the latter. It argued in a February 6, 2008 letter to the court that "the[] facts, viewed cumulatively, support the parties' mutual assent to arbitrate in Delaware" and "[i]n addition, [Business Planning's] serial references to the Delaware statutory scheme (including an express declaration of Delaware as forum locale) . . . constitute fair evidence of mutual assent sufficient to invoke the DUAA."[18] Its letter also withdrew Personnel Decisions' objection in arbitration to a Delaware locale, and it claimed this meant the parties "presently agree[d] that the arbitration should take place in Delaware."[19] Taking its letter as a whole, Personnel Decisions argued that 1) the parties had agreed to arbitrate in Delaware and 2) Business Planning had assented to applying the DUAA to the agreement.

When Business Planning submitted its responsive letter to the court two days later, on February 8, 2008, it withdrew its request contained in the AAA

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[17] *See, e.g.*, Letter from James D. Griffin to Vice Chancellor Leo E. Strine, Jr. (Feb. 8, 2008) at Ex. A (Letter from Bradley D. Hauswirth to Hannah R. Cook, (Aug. 30, 2007)).

[18] Letter from Daniel V. Folt to Vice Chancellor Leo E. Strine, Jr. (Feb. 6, 2008).

[19] *Id.*

Demand it filed in August of 2007 for a Delaware arbitration and its assertion that the DUAA applied.[20] Business Planning now sought to deny that § 5703 of the DUAA, which it had first invoked, applied to the Development Agreement. It instead contended that the parties had never agreed on an arbitration site in Delaware, and that therefore the DUAA did not apply. Because the DUAA did not apply, its argument continued, this court lacked subject matter jurisdiction to adjudicate the dispute because it had been committed to arbitration by the parties.

III. Legal Analysis

A. The DUAA Applies

The record of communications and tussle after my letter establishes that the parties never agreed to arbitrate in Delaware. But in these unusual circumstances, this flaw is not fatal to Personnel Decisions' case. Rather, there are two independent reasons why the parties' conduct in performing the Development Agreement clearly leads to application of the DUAA. The first is contractual, based on the parties' course of performing the Development Agreement. The second is equitable, and is based on Business Planning's desire to avoid a statute it was the first to invoke.

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[20] Letter from James D. Griffin to Vice Chancellor Leo E. Strine, Jr. (Feb. 8, 2008).

1. The Course Of Performing The Development Agreement Demonstrates The Parties Agreed That The Terms Of The DUAA Should Control

The Restatement of Contracts (Second) tells us that, after plain meaning, the most persuasive evidence of the parties' agreement is the course of its performance.[21] No provision in the Development Agreement specifies which arbitration act applies to the agreement, or conflicts with application of the DUAA.[22] The most helpful term within the Development Agreement itself is its statement that: "The validity, construction, *and performance* of this agreement will be governed by the laws of the state of Delaware."[23] Our law is clear that such a term is

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[21] *See* RESTATEMENT OF CONTRACTS (SECOND) § 202 cmt. g (2008) ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning. . . . Where it is unreasonable to interpret the contract in accordance with the course of performance, the conduct of the parties may be evidence of an agreed modification or waiver by one party."); *id.* § 202(4) (stating "any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement").

[22] *See City of Wilmington v. Wilmington FOP Lodge* #1, 2004 WL 1488682, *7 (Del. Ch. June 22, 2004) ("[C]ourse of performance . . . may be used to aid a court in interpretation of an ambiguous contract, [or it] it may also be used to supply an omitted term when a contract is silent on an issue.") (citing RESTATEMENT (SECOND) OF CONTRACTS § 223 & cmt. b. (1979) and 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.13 (2d ed. 2001)).

[23] Agreement ¶ 20 (emphasis added).

insufficient in itself to trigger the DUAA or, as I will discuss in a later section, demonstrate the requisite intent to apply the DUAA notwithstanding application of the FAA.[24] But, here, the parties' own performance under the Development Agreement makes it obvious that they viewed the Development Agreement as an arbitration agreement governed by the DUAA, not the FAA, a perception that likely arose out of their subjective view of the choice of law provision's effect.

For its part, Business Planning filed the First and Second Notices expressly invoking the DUAA and trying to use it to its advantage. And, as counsel for Business Planning readily admitted at oral argument, Business Planning thought the parties were proceeding under the DUAA,[25] which is the most common-sense explanation for why it first invoked the DUAA in March of 2003. Because nothing in the Development Agreement would preclude me from finding the parties agreed to apply the DUAA, the unique circumstances here lead to some practical questions. When Business Planning and Personnel Decisions agreed that the Development Agreement called for the application of the DUAA, who am I to question that determination? What do I know about their Agreement that they themselves do not?

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[24] *See, e.g., Mehiel v. Solo Cup Co.*, 2005 WL 1252348, at *6 (Del. Ch. May 13, 2005).

[25] Transcript of Oral Argument, at 22-23.

The evidence that Personnel Decisions and Business Planning agreed that the DUAA would control is overwhelming. Nearly five years have elapsed since the First Notice was sent invoking the DUAA. Over that time period the parties exchanged multiple correspondence to each other referencing the DUAA, including Business Planning's First and Second Notices, and the formal Demand filed with the AAA. Personnel Decisions and Business Planning researched and prepared briefs to this court on an issue that necessarily implicated the DUAA. Business Planning – who in 2007 had every incentive to argue the DUAA did not apply – never once hinted in any submission filed with the court that the DUAA was inapplicable.[26] After all these events occurred, nine years after the agreement was signed, seven years after the alleged breaches of contract and four years after Business Planning first invoked the DUAA in its First Notice, it took a letter from this court to reconsider a fundamental assumption underlying years of dispute. That assumption was so basic to the parties that both changed where they wanted to

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[26] *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. April 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief."), *aff'd*, 840 A.2d 641 (Del. 2003). Business Planning's briefs particularly demonstrated this belief. *See* Business Planning Reply Br. at 5-6 ("Section 5703(c) establishes the procedure a party must employ to initiate arbitration under the Delaware Uniform Arbitration Act. . . . [Business Planning] strictly complied with the requirements of Section 5703(c) in instituting the arbitration."); *see also* Business Planning Op. Br. at 4.

arbitrate when that letter injected uncertainty about its viability. I am convinced that, but for my letter, Business Planning and Personnel Decisions never would have realized there was a question about the DUAA's applicability. The course of performing the arbitration agreement therefore unambiguously demonstrates that all concerned parties believed the DUAA governed the Development Agreement.

2. Applying The DUAA Does Not Offend Delaware's Public Policy

Business Planning has argued no basis and I perceive none to find that Delaware public policy is offended by the decisions of two commercial parties, one of whom is a Delaware corporation, to choose to have the DUAA govern their arbitration agreement, even though they did not agree to hold the arbitration in Delaware. Delaware is a freedom of contract state, with a policy of enforcing the voluntary agreements of sophisticated parties in commerce.[27] Parties frequently tailor their approach to dispute resolution[28]

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[27] *E.g.*, *Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1061 (Del. Ch. 2006).

[28] *See, e.g.*, *McLaughlin v. McCann*, 946 A.2d 616 (Del. Ch. 2008) (holding reference to AAA rules in arbitration agreement allows arbitrator to determine his own authority (substantive arbitrability) pursuant to the AAA rules); *see also* Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L.J. 326, 337 (2007) ("Arbitration operates in a contract model in which arbitration legislation constitutes a set of default rules that apply only when parties fail to legislate

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and voluntary use of the DUAA, rather than the FAA, is one way to do that.[29]

The DUAA was enacted to reverse the common law hostility toward agreements to arbitrate and place them on the same ground as other contracts by ensuring they are specifically enforced and irrevocable by one party, "save upon such grounds as exist at law or in equity for the revocation of any contract."[30] Allowing sophisticated parties to choose the DUAA even for arbitrations outside Delaware only advances their freedom to contract in the field of

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the terms of arbitration. Numerous arbitration landmarks stress the decisional powers of the parties to custom forge the terms of the conflict.").

[29] This result does not result in parties "creating" subject matter jurisdiction by stipulation, as Business Planning fears. A valid arbitration clause divests this court of subject matter jurisdiction to hear disputes within its ambit. *Elf Atochem N. Am., Inc. v. Jaffari,* 727 A.2d 286, 295 (Del. 1999); *see also NAMA Holdings, LLC v. Related World Market Center,* 922 A.2d 417, 429 (Del. Ch. 2007). If the parties were to later contract to allow a claim previously covered by an arbitration clause to proceed in court, subject matter jurisdiction would not be "created" if the claim otherwise fell in this court's jurisdiction; an impediment – the contractual obligation to arbitrate a dispute – would merely be removed. Likewise, a motion to enjoin an arbitration is a claim within this court's conditional equity jurisdiction. *SBC Interactive, Inc.,* 1998 WL 749446, at *4 (finding the Court of Chancery derives subject matter jurisdiction to enforce the FAA from its inherent equity jurisdiction).

[30] 10 *Del. C.* § 5701; *see Pettinaro Constr. Co., Inc. v. Partridge,* 408 A.2d 957, 961 (Del. Ch. 1979) (noting this change in public policy).

arbitration in the security that courts will not second-guess their contractual preferences.

I therefore conclude it does not violate Delaware public policy to allow Business Planning and Personnel Decisions to elect to apply the DUAA to their agreement, as they have here.

3. The FAA Does Not Control Because The Parties Elected To Apply The DUAA

Like the DUAA, the FAA evidences a strong policy favoring arbitration of disputes that parties contract to arbitrate.[31] It is by now "well established" that the FAA displaces otherwise inconsistent provisions of state arbitration acts,[32] such as the DUAA, restraining those acts to the secondary role of governing agreements to arbitrate in intrastate commerce.[33] When determining the arbitrability of disputes, courts must display a "healthy regard for the federal policy favoring arbitration."[34]

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[31] *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *James & Jackson LLC v. Willie Gary LLC*, 906 A.2d 76, 80 (Del. 2006).

[32] *Preston v. Ferrer*, ___ U.S. ___, 128 S.Ct. 978, 988 (2008) (quoting *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272, 115 S.Ct. 834 (1995) and citing cases); *see also Southland*, 465 U.S. at 1.

[33] Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L.J. 326, 327 (2007) ("[S]tate arbitration law occupies a secondary role" to the FAA because of "its narrow interpretation to only intrastate commerce.").

[34] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("The [FAA] establishes that, as a matter of

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Nevertheless, "[t]he 'liberal federal policy favoring arbitration agreements,' manifested by [the FAA], is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.'"[35]

Consistent with its core purpose of protecting parties' voluntary right to enter arbitration contracts, the FAA does not preempt the application of state arbitration acts when parties choose to use them. Rather, parties may contract to apply state procedural law instead of the FAA, but, to protect the interests served by the FAA, courts will honor that preference only if the parties "clearly evidence their intent to be bound by such rules."[36] For the reasons previously articulated, there is "clear[] evidence"

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federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

[35] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 (1985) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1 at 24, 25 n.32).

[36] *Sovak v. Chugai Pharm Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002) (quoted parenthetically in *Mehiel v. Solo Cup Co.*, 2005 WL 1252348, at *6 n.42 (Del. Ch. 2005)); *see also Mastrobuono*, 514 U.S. at 61-62; *Volt*, 489 U.S. 468; *cf Preston v. Ferrer*, 128 S.Ct. at 988 (discussing the differences between *Mastrobuono* and *Volt*).

that the parties here intended the DUAA to govern their agreement.[37]

4. Business Planning Is Estopped To Deny The DUAA Controls

Alternatively, to allow Business Planning, the first party to specifically invoke the DUAA, to now change its position to advance its litigation aims would offend equitable principles. In particular, the doctrine of quasi-estoppel precludes Business Planning from changing its position now in litigation

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[37] *Sovak v. Chugai Pharm Co.*, 280 F.3d at 1269. One other point that is notable, is that the parties did not contract for application of the AAA rules to their agreement, a factor the U.S. Supreme Court recently found to cut in favor of the parties' desire to have the FAA control over inconsistent state arbitration laws. *See Preston v. Ferrer*, 128 S.Ct. at 988 (2008) (suggesting strongly that if an arbitration agreement incorporates the AAA rules by reference, that fact would overcome any showing by a choice-of-law clause that parties' agreed to arbitrate under a state arbitration act, and would have changed the result in *Volt*).

In the absence of clear evidence the parties intended the DUAA to control, application of §§ 5702(c) and 5703(c) would be preempted by the FAA. *Application of Prudential Secs. Inc.*, 205 A.D.2d 424, 425 (N.Y. App. Div. 1994) (holding that nearly identical New York statutory provisions, 74 N.Y. CPLR §§ 7502(b) & 7503(c) (2008), were preempted by the FAA); *see Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. at 84 (arbitrators decide the statute of limitations); *contra Matter of Propulsora Ixtapa Sur, S.A. De C.V. v. Omni Hotels Franchising Corp.*, 211 A.D.2d 546, 546 (N.Y. App. Div. 1995) (holding the FAA did not preempt because the FAA was "silent" as to arbitrability of a limitations period).

to gain an advantage. That doctrine " 'precludes a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously taken.' Quasi-estoppel applies when it would be unconscionable to allow a person 'to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit.' "[38] "To constitute this sort of estoppel the act of the party against whom the estoppel is sought must have gained some advantage for himself or produced some disadvantage to another. . . ."[39]

When it invoked the DUAA in the First Notice, Business Planning sought to ascertain whether Personnel Decisions would seek to challenge the validity or performance of the Development Agreement and whether Personnel Decisions would argue that any then-existing claims were barred by the statute of limitations. Otherwise, Business Planning threatened that Personnel Decisions would not have the right to challenge them in court. Aside from the benefits Business Planning received from its offensive use of § 5703(c) of the DUAA, its invocation of that statute caused a material detriment to Personnel Decisions. In reliance on Business Planning's

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[38] *Albertson v. Winner Automotive*, 2004 WL 2435290, at *4 (D. Del. 2004) (quoting *Bott v. J.F. Shea Co., Inc.*, 299 F.3d 508, 512 (5th Cir. 2002)).

[39] *KTVB, Inc. v. Boise City*, 486 P.2d 992, 994 (Idaho 1971) (quoting *Yuen Shee v. London Guarantee & Acc. Co.*, 40 Haw. 213, 1953 WL 7558, at *10 (Haw. 1953)).

consistent invocation of the DUAA, Personnel Decisions filed suit on a theory unique to the DUAA and researched and prepared several briefs to the court on terms of the DUAA, all for a proceeding with a limited scope.

Similarly, the equities do not favor Business Planning. It had full knowledge of all relevant facts necessary to make a determination of the DUAA's application during the period 2003 to 2007.[40] Its self-interested 180 degree turn is graceless. Business Planning is properly stuck with life as it understood it until I sent my letter, a life under the DUAA.

B. Resolving The Dispute Under The DUAA

Because I have determined that the DUAA applies, I now address the parties' primary dispute – whether the DUAA permits Personnel Decisions to seek to enjoin the arbitration proceedings because Business Planning's AAA Demand was made at a time when the underlying claims were time-barred. As I will detail momentarily, the interplay of competing subsections of §§ 5702 and 5703 of the DUAA creates an ambiguity in the statute that must be resolved. This result should not be surprising – this court has on many different occasions commented on

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[40] *Cf.* 13 WILLISTON ON CONTRACTS § 39:34 (4 ed. 2000) (constructive knowledge is sufficient to effect a waiver); *see also Pabst Brewing Co. v. City of Milwaukee*, 105 N.W. 563 (Wis. 1905).

the twisted and ambiguous nature of these sections of the DUAA.[41]

Personnel Decisions asserts that it is entitled to ask this court to enjoin the arbitration under the plain language of 10 *Del. C.* § 5702(c) because Business Planning's arbitration claims were time-barred at the time Personnel Decisions made a demand for arbitration in August 2007.[42] Section 5702(c) provides in relevant part:

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[41] *E.g., Pettinaro Constr. Co.*, 408 A.2d at 959 ("The Delaware General Assembly, in adopting the Uniform Arbitration Act, made several inexplicable changes, some of which have led to ambiguities. The entire section 5703 is peculiar to Delaware and the language of § 5703(a) and (c) are hopelessly inconsistent."); *see also W.B. Venables & Sons, Inc. v. Bd. of Educ. of Seaford Sch. Dist.*, 1981 WL 88263, at *6 (Del. Ch. June 15, 1981) ("[I]t is difficult to comprehend what the General Assembly had in mind when it enacted those provisions [relating to post-arbitration judicial review of the statute of limitations period] as part of our law."); *Dresser Indus., Inc.*, 1999 WL 413401, at *5 n.5 (suggesting the General Assembly might consider conforming the DUAA to the Uniform Arbitration Act in this regard).

[42] Business Planning makes another argument worthy of brief discussion. It claims that Personnel Decisions has participated in arbitration by appearing at a scheduling teleconference and by filing a response to the AAA Demand, which would bar its access to court under § 5703(b). I do not find these actions, meant solely to preserve Personnel Decisions' rights and to avoid prejudice, to constitute "participat[ion]" under § 5703(b). *Cf. City of Wilmington v. Wilmington FOP Lodge #1*, 2004 WL 1488682, at *7-8 (Del. Ch. June 22, 2004) (finding that a party did not participate in the arbitration when

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> If, *at the time that a demand for arbitration was made* or a notice of intention to arbitrate was served, *the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the State,* a party may assert the limitation as a bar to the arbitration on complaint to the Court as provided in § 5703(b) or by way of defense in an existing case.[43]

Section 5703(b), in turn provides:

> Subject to [§ 5703(c)], a party who has not participated in the arbitration and who has not been made or served with an application to compel arbitration *may file its complaint with the Court seeking to enjoin arbitration on the ground that* a valid agreement was not made or has not been complied with or that *the claim sought to be arbitrated is barred by limitation of § 5702(c).*[44]

Business Planning recognizes this language, but counters by arguing that a different provision dealing with the contents of the statutorily required notice of intention to arbitrate, § 5703(c), should take precedence over § 5702(c). It notes that § 5703(c) is read into § 5702(c), through § 5703(b). Section 5703(c), in relevant part, states the following:

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it helped select an arbitrator and set the place and time of the arbitration, but had not participated in discovery).

[43] 10 *Del. C.* § 5702(c) (emphasis added).

[44] 10 *Del. C.* § 5703(b) (emphasis added).

> A party must serve upon another party a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to enjoin the arbitration within 20 days after such service such party shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in Court the bar of a limitation of time. . . . A complaint seeking to enjoin arbitration *must be made by the party served within 20 days after service of the notice* or the party shall be so precluded.[45]

In other words, Business Planning contends that § 5703(c) is an absolute bar on seeking an injunction, even though Personnel Decisions is not seeking an injunction within 20 days of receiving *a notice of intention to arbitrate* (a "Notice"), but rather, based on the claims being time-barred at the time it received a *demand for arbitration* (a "Demand") in accordance with § 5702(c)'s option to seek an injunction if the underlying claims are time-barred at the time of a Notice *or* at the time of a Demand.

One of the peculiarities underlying this case stems from Business Planning's attempt to exploit

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[45] 10 *Del. C.* § 5703(c) (emphasis added).

the ambiguity in the language of the DUAA that bifurcates the Notice from the Demand. Business Planning argues that because § 5703(c) refers only to Notice, a Notice can exist separately from a Demand and in essence serve as a placeholder complaint.[46] That reading of the DUAA separates Notice from Demand in a manner unsupported by most, if not all other sources of arbitration law. The American Arbitration Association and the leading commercial arbitration treatise view Notice and Demand as one and the same because they are typically part of the same package – the document that commences arbitration must also necessarily be communicated to one's arbitration adversary.[47] In other words, as in litigation, service of an arbitration Notice usually is contemporaneous with or follows the filing of the document stating the claims and formally commencing the adversarial process, which in this case was Business Planning's Demand.[48] In light of

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[46] 10 *Del. C.* § 5703.

[47] *See* AAA Commercial Arbitration Rule R-4(a)(i), (ii), *available at* http://www.adr.org/sp.asp?id=22440#R4 (stating that "[t]he initiating party (the 'claimant') shall, within the time period, if any, specified in the contract(s), give to the other party (the 'respondent') written notice of its intention to arbitrate (the 'demand')" and that "[t]he claimant shall file at any office of the AAA two copies of the demand"); LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 18:2, at 18-2 (3d ed. 2007) (stating that the "demand for arbitration" is "often called 'notice of intention to arbitrate' in statutory language").

[48] This is not to suggest that these terms are not ambiguous and that the plain language of "notice of *intention* to arbitrate" does not suggest that the Notice might come before the Demand.

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arbitration practice, the better approach to reading the DUAA's ambiguous language and lack of explicit definitions of Notice and Demand is that the Notice and the Demand are generally part of the same package. Stated differently, the General Assembly's separation of Notice from the Demand in § 5703(c) does not indicate that a Notice can exist in the absence of the Demand, but that the simultaneous or subsequent formal service of a Notice compliant with § 5703(c) can have the effect of invoking the 20-day

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Nevertheless, that plain language reading does not comport with the use of "notice of intention to arbitrate" as an arbitration term of art that contemplates Notice and Demand being the same or the general understanding that in litigation, which is the closest analog to arbitration proceedings, notice is given at or after the filing of the complaint. An unscientific search of the relevant case law suggests Delaware lawyers generally take the view that Notice is served at or *after* the Demand. *See, e.g., Nutzz.com, LLC v. Vertrue Inc.*, 2006 WL 2220971, at *3 (Del. Ch. July 25, 2006) (Notice and Demand made on the same day); *Fidelity & Deposit Co. of Maryland v. State Dept. of Admin. Servs.*, 830 A.2d 1224, 1228 (Del. Ch. 2003) (Notice made following Demand); *Weymouth v. State of Delaware*, 1983 WL 17987, at *3 (Del. Ch. July 18, 1983) (same). Moreover, a party in a recent case who had every incentive to demonstrate that the Notice should precede the Demand, could not find any relevant case supporting that proposition. *See Fidelity & Deposit Co. of Maryland*, 830 A.2d at 1228 ("F & D argues that a requirement that the Notice be served before the Demand is somehow 'implied' by the statute. To buttress this 'implication' argument, F & D relies on cases from outside jurisdictions, in irrelevant legal contexts (i.e., landlord/tenant law), to create a general proposition that a 'notice' must always precede some other action.").

period for seeking pre-arbitration judicial review of the covered defenses.

In fact, in a prior case where a party attempted to exploit the DUAA's opaque language on Notice and Demand, this court held that a Demand can serve as a Notice when it meets the statutory requirements for a Notice and is served on the other party.[49] Likewise, a recent case held that a statutorily compliant Notice can follow a Demand where that Demand was the complaint-like document that "procedurally [began] the arbitration process."[50] In that case, bifurcating the

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[49] *Bd. of Educ. of the Seaford Sch. Dist. v. W.B. Venables & Sons, Inc.*, 1978 WL 171757, at *2 (Del. Ch. Dec. 18, 1978) ("The mere fact that the notice served on Seaford was captioned 'Demand for Arbitration' rather than a 'Notice of Intention to Arbitrate' should not leave Seaford in any doubt as to Venables' intentions. The distinction Seaford attempts to draw here is merely semantical, for it is clear that the 'Demand for Arbitration' served upon them was sufficient notice to them of Venables' intention to arbitrate."). Similarly, no harm would be done to the DUAA by construing a document entitled as a Notice as also being a Demand if it serves the function of commencing arbitration. This is less likely to happen in practice though because the document that commences arbitration with the AAA is entitled a "Demand for Arbitration." *See* AAA, Commercial Arbitration Rules Demand for Arbitration Form, *available at*, http://www.adr.org/si.asp?id=3771; *see also W.B. Venables*, 1978 WL 171757, at *2 ("I might add, that the form utilized by Venables is the official form of the American Arbitration Association and serves as their initial pleading for the institution of arbitration proceedings.").

[50] *Fidelity & Deposit Co. of Maryland*, 830 A.2d at 1228 ("By accepting F & D's position that Notice must precede the Demand (which procedurally begins the arbitration process), the court

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Notice from the Demand did not adversely affect the arbitration respondent because that party still had the full 20 days to seek a court injunction. The question here is whether a Notice can precede a Demand and have the effect of invoking § 5703(c)'s 20-day preclusion period where the facts indicate that that Notice did not also serve as or follow a Demand, that is, when the Notice was not complaint-like and did not procedurally begin the arbitration process.[51]

That question arises from dueling sections of the DUAA. Particularly, when §§ 5702(c) and 5703(c) are read together, § 5703(c) is ambiguous with respect to whether it prohibits judicial review where the respondent does not seek an injunction within 20 days of receiving a *Notice* because the claims were not time-barred as of that time but rather brings a prompt action at the time it receives the *Demand* because that is when the claimant first formally spelled out its claims and formally began the arbitration process. Because of this ambiguity, I will attempt to find the construction of the DUAA that does the least violence to the statute, and that "resolve[s] the ambiguity by reconciling its language with the

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would be imposing an additional term upon the statute that was not put in place by the legislature.").

[51] These arcane issues about Notice and Demand that have been generating litigation over the last 30 years could be resolved by the General Assembly either conforming the DUAA to the Uniform Arbitration Act or rewriting the statute to resolve these issues. *See* note 41, *supra*.

legislative intent."[52] In doing so, I look to the statute as a whole and seek to avoid "literal or perceived interpretations which yield mischievous or absurd results."[53]

Under Business Planning's view of the DUAA, §§ 5702(c) and 5703(c) operate to create the ultimate "gotcha" provision to advantage indolent claimants. All a claimant needs to do to deny its arbitration adversary an injunction preventing arbitration of time-barred claims is to send a Notice at a time when the underlying claims are not time-barred and then wait to file a Demand until after the statute of limitation expires. A respondent would be thereby precluded from raising an argument in a petition to enjoin at the time of the Notice – any argument would be frivolous at that time – and the respondent would also be precluded from asserting ripe defenses at the time of the Demand.[54] Such an interpretation of

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[52] *Daniels v. State,* 538 A.2d 1104 (Del. 1988); *see also* NORMAN J. SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:5, at 212, 216 (7 ed. 2007) ("If doubt or uncertainty exists as to the meaning or application of a statute's provisions the court should analyze the act in its entirety and harmonize its provisions in accordance with legislative intent and purpose.").

[53] *Spielberg v. State,* 558 A.2d 291, 293 (Del. 1989) (citing *Daniels v. State,* 538 A.2d 1104, 1110 (Del. 1988); *Burpulis v. Director of Revenue,* 498 A.2d 1082, 1087 (Del. 1985)).

[54] Although the text of § 5714(a)(5) of the DUAA suggests a meaningful post-arbitration judicial review of arbitration awards for time-barred claims, the confusion caused by the various DUAA provisions inspired a decision of this court

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the statute seems contrary to the General Assembly's discernable intent in enacting § 5702(c) and to other relevant principles of our public policy.

Taken to its extreme, a claimant could rekindle a dispute before an arbitrator dozens or even hundreds of years later without allowing a respondent access to court so long as the claimant served a Notice before the claim was time-barred. Under Business Planning's interpretation, any party to an arbitration

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suggesting that post-arbitration review of such defenses is not available. *W.B. Venables*, 1981 WL 88263, at *7 ("Boiled down, the Delaware Act seems to hold that unless a timely application is made to the Court under § 5703 to enjoin arbitration, the decision on a Statute of Limitations defense is left to the discretion of the arbitrators and is not subject to a later review on the merits by the Court."). Under the reasoning in *W.B. Venables*, the reference in § 5714(a)(5) to the § 5702(c) time-limitations section was added merely to give effect to other provisions in the statute, and not to provide for another review of an arbitrators' determination of a time-bar doctrine. *See id.* That reasoning, to be candid, seems inconsistent with the plain language of § 5714(a)(5). That language says that a party precluded from seeking pre-arbitration review of a limitations defense by a court may seek to vacate an arbitration award on the grounds that the claims were time-barred so long as the party presented that defense to the arbitrator and gave him a chance to consider it in the first instance. In fact, a comparison of § 5714(a)(5) to its corresponding provision in New York's arbitration act – an act that predates the DUAA and contains nearly identical language to §§ 5702(c) and 5703(c) – indicates that the General Assembly consciously departed from the New York act's model to confer a substantive post-arbitration review by a court. *Compare* 10 *Del. C.* § 5714(a)(5) *with* N.Y. CPLR § 7511(b)(2)(iv); *compare* 10 *Del. C.* §§ 5702(c) & 5703(c) *with* N.Y. CPLR §§ 7502(b) & 7503(c).

agreement seeking to prohibit judicial review could (and should) send a Notice immediately after its execution that merely identifies the "agreement pursuant to which arbitration is sought," thereby forever precluding the other party from enjoining the arbitration of time-barred claims.[55] Business Planning's choice to wait for four years after filing the First and Second Notice in 2003 – a full year longer than another full application of the relevant limitations period – suggests that these absurd hypotheticals are not inconceivable.

Allowing the Notice to be in effect forever in such a circumstance would be at odds with policy determinations made in analogous areas of Delaware law. Delaware has a strong policy against giving substantive weight to placeholder actions. In one manifestation of that policy, the filing of a complaint and praecipe does not toll the statute of limitations unless the summons is delivered in a timely manner.[56]

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[55] This result would occur, in part, because of the minimal notification requirements for a Notice, which on the face of § 5703(c) do not even include a statement of the asserted claim.

[56] *See, e.g., Russell v. Olmedo*, 275 A.2d 249, 259 (Del. 1971) ("[O]rdinarily the filing of an action will commence the tolling of the statute of limitations, but . . . this is subject to the requirement that the plaintiff diligently seek to bring the defendant into court and subject him to its jurisdiction."); *cf.* Court of Chancery Rule 41(b), (e) (providing for the dismissal of cases where the plaintiff has failed to prosecute or the case has been inactive for one year). And, more analogous to the facts of this case, just saying that you are planning to sue someone without formally acting on that statement does not toll the

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In another, a Delaware court applying the *McWane* doctrine, "typically will defer to a first-filed action in another forum and will stay Delaware litigation pending adjudication of the same or similar issues in the competing forum."[57] But Delaware courts do not give any effect for the purposes of first-filed status where the other litigation is merely a placeholder action that has not been perfected by proper service of a complaint.[58] Delaware's public policy against the

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statute of limitations. *See* 10 *Del. C.* § 8106 (stating that "no action" based on a breach of contract "shall be brought after the expiration of 3 years from the accruing of the cause of such action"); Court of Chancery Rule 3(a)(1) ("An action is commenced by filing with the Register in Chancery a complaint. . . ."); *cf.* 18 *Del. C.* § 6856 ("A plaintiff may toll the [two-year statutes of limitations for a claim against a health care provider for personal injury] for a period of time up to 90 days from the applicable limitations contained in this section by sending a Notice of Intent to investigate to each potential defendant.").

[57] *Fort James Corp. v. Beck*, 2005 WL 2000761, at *4 (Del. Ch. Aug. 16, 2005) (quoting DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, § 5-1 (2005)).

[58] *See, e.g., Caithness Resources, Inc. v. Ozdemir*, 2000 WL 1741941 (Del. Ch. Nov. 22, 2000) ("The [*McWane*] doctrine, however, is not meant to provide comfort to indolent plaintiffs who do no more than file a placeholder in another state without a complaint that informs the defendant of the claims it faces."); *Joyce v. Cuccia*, 1996 WL 422339, at *5 (Del. Ch. July 24, 1996) ("A plaintiff cannot file a complaint, keep that pleading in his 'back pocket' by withholding service and not informing the adverse party of its pendency, and later . . . be heard to argue that the first complaint is a 'first filed' action. . . ."); *Stepak v. Tracinda Corp.*, 1989 WL 100884, at *6 (Del. Ch. Aug. 18, 1989)

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pre-textual tolling of limitations periods and the securing of a preferred forum cuts against Business Planning's interpretation of the DUAA.

Rather, the more sensible resolution of this statutory ambiguity is to read the DUAA in accord with the General Assembly's objectives in adopting the scheme of review for limitations of time found in §§ 5702(c), 5703(c), and 5714(a)(5). This is accomplished by reading § 5703(c) to bar a pre-arbitration judicial review of those defenses only when a claimant has filed all the documents necessary to truly begin the arbitration process – that is, when the Notice accompanies the Demand or is sent after it.[59] When a claimant has done that, § 5703(c)'s 20-day time-bar kicks in. But when it has not, § 5702(c) gives the respondent an independent right to pre-arbitration judicial review if the claims are time-barred as of the time a later Demand is filed.

This reading gives effect to both § 5702(c) and § 5703(c) in a way that does not encourage arbitration claimants to file a premature Notice not accompanied by all the documents required to genuinely initiate

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("The formality of filing a complaint, while taking no step to actually commence litigation, cannot alone have significance.").

[59] This is not to say that parties are required to involve the AAA or its rules to arbitrate their disputes, although the admitted reality is that they commonly do. When they do not, this reading of the DUAA requires that, to be effective, the Notice must accompany or follow the document or documents that in reality begin the arbitration process.

the arbitration process, bifurcate that Notice from a Demand, and delay for an absurd length of time before sending the second of two documents that are ordinarily sent on the same day. Moreover, it does not enable a party to use the Notice as a placeholder to preclude an appropriate injunction.[60] This reading also gives meaning to the word "or" in § 5702(c), by reading it as envisioning that a respondent would not lose its right to present an injunction application if the claimant filed a timely Notice, but then sat on its hands before genuinely initiating the arbitration process by making its Demand.[61] By allowing a party

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[60] I recognize that another way to interpret the statute is that a party in Personnel Decisions' position cannot obtain judicial review of its limitations defenses until after the arbitration is concluded, using § 5714(a)(5). That is, under this approach a party in Personnel Decision's predicament is cut off – or "precluded" in § 5703(c)'s terms – from enjoining the arbitration on limitations grounds, but can seek review of that limitations defense from a court in post-arbitration vacatur proceedings under § 5714(a)(5) so long as it has presented that defense to the arbitrator. That reading is plausible, although *W.B. Venables* casts doubt on it. *See* note 54, *supra*. But, in my view, the General Assembly's desire to protect respondents facing stale claims by permitting pre-arbitration review and Delaware's general policy against tactical games-playing through the use of placeholder filings suggests permitting Personnel Decisions to proceed now in reliance on the language of § 5702(c) permitting judicial review.

[61] This is not the first time this court has observed that the General Assembly expressly included the ability to seek judicial review based on the Demand rather than just the Notice because it contemplated claimants playing games with the Notice. *See Fidelity & Deposit Co. of Maryland*, 830 A.2d at 1229 n.12 (observing that the ability to seek judicial review if the

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to attack a torpid Demand, this reading of § 5703(c) discourages claimants from dilatory tactics of this kind.

This interpretation likewise comports with the objective that the General Assembly had in adopting those sections of the DUAA, which becomes apparent upon a comparison to other adoptions of the Uniform Arbitration Act. Although the general intent behind the DUAA is a desire to encourage arbitration, §§ 5702(c), 5703, and 5714(a)(5) indicate another objective. The General Assembly evinces a desire for parties facing arbitration to have the ability to seek an injunction against the arbitration of time-barred claims. That desire is obvious because the Uniform Arbitration Act does not have counterpart provisions to the DUAA that contemplate pre-arbitration judicial review of time bar defenses. Delaware is one of a select few states to add a provision like § 5702(c) to its version of the Uniform Arbitration Act.[62]

Taken together, the relevant policy considerations counsel in favor of allowing Personnel Decisions to present its Limitations Defenses in this action.

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underlying claim is time-barred at the time of Demand allows the respondent to seek judicial review immediately upon learning of a Demand without having to wait for Notice in a situation where the claimant delays in sending Notice).

[62] *See* N.Y. CPLR §§ 7502 & 7503; GA. CODE ANN. §§ 9-9-5 & 9-9-6. These provisions of the DUAA are almost identical to New York's arbitration act, which predates the DUAA's 1972 enactment date.

By allowing it to do so, the policy interest in ensuring that arbitration claimants do not file placeholder Notices and then unreasonably delay in actually stating their claims is advanced. So too is the General Assembly's policy judgment, which is contrary to the FAA or Uniform Arbitration Act, that our courts should be open to hear injunction actions. Finally, so long as this court requires Personnel Decisions to move with dispatch there will be no unreasonable potential for abuse, especially given the pressures for timely action that already influence respondents.[63]

IV. Conclusion

For the foregoing reasons, Personnel Decisions motion for a preliminary injunction is GRANTED, and Business Planning's motion to dismiss is DENIED.

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[63] Although my reading of § 5702(c) does not subject a respondent to a specific deadline for seeking an injunction absent an effective § 5703(c) Notice, the respondent must seek an injunction quickly after receiving a Demand because the respondent either participates in the arbitration, after which it cannot seek an injunction, or it delays participation in the arbitration after receiving a Demand and risks the entry of a default arbitration award. *See* 10 *Del. C.* § 5703(b). Moreover, a party seeking injunctive relief must move promptly or face the bar of laches. *See, e.g., Wright v. Scotton,* 121 A. 69, 72 (Del. 1923) ("The rule is well established, independent of any statute of limitations, that if a party is guilty of laches or unreasonable delay in applying for an injunction, he thereby forfeits his claim to that special form of remedy.").

AMERICAN ARBITRATION ASSOCIATION

BUSINESS PLANNING SYSTEMS, INC. Ten Pennsylvania Avenue, Rehobeth Beach, DE 19971, Claimant, v. PERSONNEL DECISIONS, INC. 2000 VII Tower, 45 South Seventh Street, Minneapolis, MN 55402, and PREVISOR, 650 3rd Avenue South, Suite 1300 Minneapolis, MN 55402, Respondents.	AAA Claim No.

DEMAND FOR ARBITRATION
STATEMENT OF CLAIM

Business Planning Systems, Inc. ("BPS") files this Demand for Arbitration and states as follows:

1. The Demand is made under the American Arbitration Association's Commercial Arbitration Rules.

Parties

2. Claimant BPS is incorporated under the laws of Delaware. It develops and licenses computer software.

3. Among other activities Respondent Personnel Decisions, Inc. ("PDI") designed and marketed pre-employment screening tests used by employers to predict a potential employee's job performance by identifying specific personality traits.

4. Respondent PreVisor is an assignee of PDI's rights and obligations under a certain Development and Marketing Agreement entered into by PDI and Claimant BPS on June 15, 1998 (the "Agreement"). (Ex. A).

Nature of Claim

5. This is a claim for breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty, arising from Respondents' willful failure to adhere to the terms of the Agreement. BPS asserts a claim for compensation under the doctrine of *quantum meruit* in the alternative.

6. BPS seeks damages from Respondents' in an amount not less than $5 million

7. BPS requests that this case proceed in accordance with Rules R-1 through R-54 of the Commercial Arbitration Rules of the American Arbitration Association.

Arbitration Clause and Choice of Law Rules

8. The Agreement contains the following provision relating to arbitration:

> PDI and BPS agree that any dispute that cannot be amicably resolved within 30 days will be submitted to and resolved by arbitration. In this event, the parties will agree upon a neutral arbiter who has significant experience with software issues, or will request that an appropriate neutral arbiter be selected from a list of qualified individuals by the American Arbitration Association. Any decision of the arbiter will be binding and shall be enforceable by a court of competent jurisdiction.

(Ex. A at ¶ 23).

9. The Agreement provides that its "validity, construction, and performance . . . will be governed" by Delaware law. *Id.*, at ¶ 20.

10. The Agreement was entered into and performed in the State of Delaware.

11. Accordingly, BPS requests an arbitration hearing at a convenient location in Delaware.

Background

12. Prior to June 1998, Respondent PDI developed and marketed a successful paper-and-pencil Employment Inventory Test ("PI Test"). PDI's customers administered approximately two (2) million paper-and-pencil PI Tests annually. PI Test results were proven to be successful in predicting the likelihood of an employee's retention and job performance in a wide range of employment positions.

13. It was disclosed to BPS that PDI's revenues from paper-and-pencil PI Tests had grown to more than $5 million, annually. In order to expand sales even more, and maintain its competitive posture, PDI sought out BPS to develop software necessary to computerize the PI Test.

14. The Agreement eventually entered into by the parties provided for BPS' initial development of a Windows-based program for administration and scoring of PDI's PI Test. (Ex. A). The future development of web-based software is expressly contemplated in the Agreement. (Ex. A – Specifications). BPS is entitled to royalties equal to ten percent (10%) of PDI's gross monthly revenues from the sale of BPS supported products. (Ex. A, ¶¶ 11-13). Based on existing sales of the PI Test, the parties contemplated that BPS' income from royalties would exceed $500,000, annually.

15. At all relevant times during the period of software development, PDI approved BPS's work product, in accordance with the Agreement. (Ex. A, ¶¶ 2-7). And, in February 2000, PDI indicated its final acceptance of the completed product. (*see*, Ex. A, ¶ 7). From 1999 through March 2003, BPS received only $15,363 in royalty payments. BPS expended more than 3,000 hours of professional computer software engineer time developing the PI Test software.

16. PDI agreed to "use reasonable efforts to sell BPS products to new customers and . . . encourage [there]

use by existing customers." (Ex. A, ¶ 15). Both parties agreed that neither could "assign its rights or obligations without the agreement of the other party." (Ex. A, ¶ 19). The Agreement granted PDI an option to "relieve BPS of further responsibility for developing or maintaining the product" in consideration of its payment of royalties to BPS for an additional 48 months. (Ex. A, ¶ 16). BPS could require PDI to exercise the option after the first anniversary of the Agreement. *Id.*

17. In September 2000, BPS learned that PDI had assigned its rights and obligations under the Agreement, as part of a larger transfer of interests, to ePredix, a company that was subsequently merged into and became Respondent ePreVisor. Unlike PDI, ePredix lacked any incentive to market BPS supported products. ePredix had its own means and methods for marketing computerized EI Tests, and could do so without having to pay BPS royalties under the Agreement.

18. BPS served Respondents with a Demand for Arbitration on March 19, 2003. The Demand for Arbitration was revised and amended on July 1, 2003. Respondents were placed on notice of BPS's claims and advised, pursuant to Delaware Code Ann. Title 10, § 5703(o), that unless they applied to stay arbitration by asserting a statute of limitations defense within twenty (20) days from receipt, they were precluded thereafter from doing so. Respondents did not apply for a stay or assert a statute of limitations defense.

COUNT I
(Breach of Contract)

19. BPS realleges the allegations of paragraphs 1 through 18, above.

20. Respondents are bound by their obligations under the Agreement.

21. BPS fully performed its obligations under the Agreement.

22. Respondents willfully breached the Agreement by failing to use reasonable efforts to market products supported by the software developed by BPS, and such breach is continuing in nature.

23. Respondents also willfully breached the Agreement by assigning, or otherwise transferring, PDI's rights and obligations under the Agreement to ePredix without BPS's agreement, knowledge or consent.

24. BPS's reasonable expectancy of royalty income, as contemplated by the parties, was frustrated entirely as a direct consequence of the breaches set forth above.

WHEREFORE, BPS seeks an award of $5 million, plus interest, costs and all other relief to which it is entitled.

COUNT II
(Breach of Covenant of Good Faith and Fair Dealing)

25. BPS realleges the allegations of paragraphs 1 through 24, above.

26. Respondents' arbitrary and capricious conduct toward BPS frustrated the purpose of the Agreement. Respondents took advantage of their superior position to control implementation of the Agreement's terms to the detriment of BPS.

27. Respondents' bad faith conduct frustrated BPS's reasonable expectations under the Agreement.

WHEREFORE, BPS seeks an award of $5 million, plus interest, costs and all other relief to which it is entitled.

COUNT III
(Breach of Fiduciary Duty)

28. BPS realleges the allegations of paragraphs 1 through 27, above.

29. BPS reposed special trust in Respondents to fulfill their obligations under the Agreement. A special duty to act in good faith and protect BPS's interests against their own selfish interests and self-dealing arose from Respondents' superior position in implementing the terms of the Agreement.

30. Respondents' breach of their fiduciary duty caused the complete loss of BPS's reasonable expectancy of royalty income under the Agreement.

WHEREFORE, BPS seeks an award of $5 million, plus interest, costs and all other relief to which it is entitled.

COUNT IV

(Doctrine of *quantum meruit*)

31. BPS realleges the allegations of paragraphs 1 through 30, above.

32. In the alternative, under the doctrine of *quantum meruit*, BPS is entitled to the actual value of the services performed on behalf of Respondents.

33. BPS performed services for Respondents with an expectation that Respondents would compensate BPS.

34. Respondents were on notice that BPS expected to be compensated for the reasonable value of its services.

WHEREFORE, BPS seeks an award of at least $450,000, plus interest, costs and all other relief to which it is entitled.

Dated: 8/10/07

Respectfully submitted,

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(2)

Supreme Court, U.S.
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No. 08-1548

In the

Supreme Court of the United States

BUSINESS PLANNING SYSTEMS, INC.,

Petitioner,

– v. –

PERSONNEL DECISIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-QUESTIONS PRESENTED

1. Did the Delaware Courts commit clear error when they found "overwhelming" evidence that the parties had agreed that the Delaware Uniform Arbitration Act would govern their transaction?

2. Did the Delaware Courts commit clear error when they held that BPS was estopped from reversing its prior position that the Delaware Uniform Arbitration Act governed the parties' transaction?

CORPORATE DISCLOSURE STATEMENT

Respondent Personnel Decisions, Inc. has no parent corporation. No publicly held corporation owns 10% or more of PDI's stock.

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STATEMENT OF THE CASE

Respondent, Personnel Decisions, Inc. ("PDI"), develops and sells a series of pre-employment screening tests that, prior to June of 1998, were administered in paper and pencil form. On or about June 15, 1998, PDI and Petitioner, Business Planning Systems, Inc. ("BPS"), entered into a Development and Marketing Agreement (the "Agreement") whereby BPS promised, among other things, to develop, maintain and improve computer software for the purpose of administering, scoring and presenting the results of the Employment Tests. (A41-42).

The Agreement provided that: "[t]he validity, construction, and performance of this agreement will be governed by the laws of the state of Delaware." (A41). It further provided for the arbitration of any dispute between the parties:

> PDI and BPS agree that any dispute that cannot be amicably resolved within 30 days will be submitted to and resolved by arbitration. In this event, the parties will agree upon a neutral arbiter who has significant experience with software issues, or will request that an appropriate neutral arbiter be selected from a list of qualified individuals by the American Arbitration Association. Any decision of the arbiter will be binding and shall be enforceable by a court of competent jurisdiction.

(A40-41).

On or about March 19, 2003, counsel for BPS wrote to counsel for PDI, alleging that PDI had breached the Agreement nearly three years earlier, in May

2000. In that same letter, BPS enclosed a Notice of Intention to Arbitrate its claims against PDI, and specifically cited to 10 *Del. C.* § 5703(c) to invoke the application of the Delaware Uniform Arbitration Act ("DUAA"). (A7-8).

After exchanging correspondence, on July 1, 2003, BPS sent PDI a second Notice of Intention to Arbitrate, which again specifically cited to and invoked the operation of the DUAA. On or about July 15, 2003, PDI, through its counsel, wrote BPS and denied that PDI had breached the Agreement. Despite PDI's explicit rejection of BPS' claims, and corresponding refusal to negotiate settlement, BPS did not timely file a Demand for Arbitration at any time in 2003. In fact, BPS did nothing for the next four years. (A9-10).

Four years later, on August 10, 2007, BPS filed a Demand for Arbitration (the "Demand") pursuant to paragraph 23 of the Agreement. (A39-46). In the Demand, BPS alleged that Delaware law governed the parties' dispute and explicitly demanded "an arbitration hearing at a convenient location in Delaware." (A41, emphasis added). The AAA cover sheet BPS served with its Demand likewise listed "Delaware" as the hearing locale.

Because BPS's seven-year-old contract claims were ostensibly barred by the statute of limitations, PDI sought an Order from the Court of Chancery, pursuant to 10 *Del. C.* §§ 5702 and 5703(b) of the DUAA, to enjoin BPS from arbitrating those claims. The original issue put before the Court of Chancery was whether PDI would be prohibited from seeking to enjoin the arbitration of these claims by 10 *Del. C.*

§ 5703(c). (*See* Petition at 8). The question then posed was one of state statutory construction; *i.e.*, whether the claims in the Notices were time-barred.

Both parties fully briefed that issue, and neither party raised any question concerning jurisdiction and/or the applicability of the DUAA. Before those issues were decided, however, on February 6, 2008, the Court of Chancery raised the applicability of the DUAA *sua sponte* and directed supplemental briefing. (A16-17).

After supplemental briefing and oral argument were completed, on May 5, 2008, the Court of Chancery issued its Memorandum Opinion. In that well-reasoned decision, the Court of Chancery held both that the parties' course of performance conclusively established the applicability of the DUAA via mutual consent and that BPS was estopped from denying it. (A14-17).

Rather than pursuing interlocutory review, BPS intentionally defaulted on the merits, consenting to the entry of a permanent injunction on the ground that its arbitration claims were time-barred. It then appealed on jurisdictional grounds. Its appeal was unsuccessful. By Order dated March 17, 2009, the Supreme Court of the State of Delaware affirmed the judgment of the Court of Chancery "on the basis of its analysis of the parties' course of conduct, and its analysis of the relevant statutes, as set forth in the Memorandum Opinion dated May 5, 2008." (A1).

BPS now petitions for a Writ of Certiorari on two grounds: (a) first, that "[t]he Supreme Court of Delaware's decision conflicts with *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Preston v. Ferrer*, Ferrer, __ U.S. __, 128 S. Ct. 978 (2008)"; and (b)

second, that "the balance of equities test engaged in by the Chancery Court conflicts with the broad mandate of the FAA and ignores Respondent's remedy at law." (*See* Petition at 9, 14.) Neither argument is correct, nor appropriate for review by this Court, and so the Petition should be denied.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 provides in relevant part that: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." That is the only type of error that BPS is asserting here. Its Petition should be denied.

I. THE COURT OF CHANCERY AND DELAWARE SUPREME COURT APPLIED FEDERAL LAW CORRECTLY

There is no dispute in this case as to the operative rule of law. The Court of Chancery correctly held that: "parties may contract to apply state procedural law instead of the FAA, but, to protect the interests served by the FAA, courts will honor that preference only if the parties 'clearly evidence their intent to be bound by such rules.'" (A-20, *citing, inter alia, Sovak v. Chugai Pharm Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61-62 (1995); *Volt Info. Scis., Inc., v. Bd. of Trs.*, 489 U.S. 468 (1989)). BPS admits that this is the correct FAA preemption standard. (*See* Petition at 9-10).

However, BPS argues that the Court of Chancery, and then the Delaware Supreme Court, applied the foregoing standard incorrectly when those Courts found: "'clear[] evidence' that the parties here intended the DUAA to govern their agreement." (A1,20-21). BPS disagrees with the Court's factual finding, arguing that "under the facts of this case ... there is no clear and unequivocal assent by the parties to eschew the FAA in favor of the DUAA." (*See* Petition at 13). BPS would therefore like this Court to review the Court of Chancery's factual findings *de novo*. Such a request plainly falls outside Supreme Court Rule 10 and should be denied.

Realizing this, BPS attempts to reframe the issue as something other than what it is. First, it generically claims that the Delaware Supreme Court's decision "conflicts with" this Court's decisions in *Southland Corp.* and *Preston*. (*See* Petition at 9). BPS, however, never explains <u>how</u> these decisions are in conflict. That is because they are not.

In *Southland Corp., supra*, this Court found that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, creates "a substantive rule applicable in state as well as federal courts." 465 U.S. at 16. No one disputes this, just as no one disputes that parties – such as BPS and PDI here – may agree to apply state arbitration rules even if such rules are inconsistent with those set forth in the FAA. *See Volt Info. Scis., Inc., v. Bd. of Trs.*, 489 U.S. 468, 479, (1989). The test, as explained in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61-62 (1995), is whether the parties clearly evidenced their intent to be bound by such rules. Here, the Court found "overwhelming" evidence that BPS and PDI did just that.

Preston, supra, is not to the contrary. In that case, unlike here, there was no evidence – let alone "overwhelming" evidence – that the parties agreed to have the conflicting state statute, the California Talent Agencies Act ("TAA"), govern their transaction in place of the FAA. 128 S.Ct. at 927. Rather, the issue was whether that statute inherently trumped the FAA. *Id.* This Court ruled it did not. *Id.* at 989. Because this Court's decision in *Preston* did not address the issue of whether the parties agreed by their words or conduct that state law would apply, *Preston* has no application to the facts of this case, in which the Court found that such an agreement was reached. (A20-21).

In sum, this is not a dispute about which legal standard is proper, but rather whether the Delaware Courts properly applied the agreed-upon legal standard. As set forth below, they did. Their factual findings should not be disturbed.

II. THE COURT OF CHANCERY AND DELAWARE SUPREME COURT CORRECTLY FOUND THAT THE PARTIES AGREED TO APPLY THE DUAA TO THEIR TRANSACTION

The Court of Chancery properly applied the Delaware Uniform Arbitration Act ("DUAA") for at least two separate reasons. First, as the Court of Chancery held, overwhelming evidence of the parties' course of performance established the mutual assent necessary to invoke the DUAA. Second, BPS was rightfully estopped from changing its position on the applicability of the DUAA to take unfair advantage of circumstances of its own making. (A2-38).

A. THE PARTIES AGREED TO APPLY THE DUAA

First, the Court of Chancery held that the parties' course of performance overwhelmingly establishes the mutual assent necessary to invoke the application of the DUAA. This holding is correct.

Evidence of mutual assent to arbitrate pursuant to the DUAA is found in, *inter alia*, the following undisputed facts of record: (i) first and foremost, that BPS filed two notices of intent to arbitrate which provided written notice to PDI pursuant to 10 *Del. C.* § 5703; (ii) that the formal demand for arbitration BPS filed with the American Arbitration Association ("AAA") designated Delaware, and only Delaware, as the hearing locale; and (iii) that the Agreement upon which the arbitration is based states that the validity, construction and performance of that agreement will be governed by Delaware law. (*See* Petition at 7-8; A41). This evidence, viewed cumulatively and under the totality of circumstances, best expresses the parties' mutual assent to arbitrate under the DUAA.

It is undisputedly the rule that "under § 5702(a) it is the parties' agreement to arbitrate in Delaware that confers jurisdiction on this Court over cases arising under the DUAA." *Dresser Indus., Inc. v. Global Indus. Technologies,* Inc., 1999 WL 413401, *3 (Del. Ch. Jun. 9 1999) (emphasis added) (*citing SBC Interactive, Inc. v. Corporate Media Partners*, 1998 WL 749446, *3 (Del. Ch. Oct. 17, 1998), *Gen. Elec. Co. v. Star Tech., Inc.*, 1996 WL 377028, *6 (Del. Ch. July 1, 1996)). As explained in *Star Technologies*, "the present interpretation of the Act is consistent with interpretations in other states where Courts

have ruled that, for a court to obtain jurisdiction to confirm or vacate an award, the parties must either provide in their written agreement for arbitration in that state or, by common assent, actually arbitrate the matter in that state." *Id.* at *5 (emphasis added).

BPS's arguments to the contrary are erroneous. BPS asserts that the Court of Chancery erred by not giving enough weight to a presumption in favor of the FAA. Specifically, BPS argues that the reference in the arbitration clause to the AAA's rules for selecting an arbitrator favors just such a presumption. (*See* Petition at 12-13.) That is not correct. The clause does not refer to any rules, let alone those adopted by the AAA. Instead, the clause gives the parties an option of selecting arbitrators from a list of qualified individuals under the AAA. As the Court found, that optional proviso does not constitute a wholesale adoption, explicit or implicit, of AAA rules for arbitration. (A5 at n.2).

B. BPS WAS RIGHTFULLY ESTOPPED FROM CHANGING POSITIONS

The Court of Chancery rightfully (and alternatively) estopped BPS from changing positions on the exercise of jurisdiction. As the Court found:

> When it invoked the DUAA in the First Notice, Business Planning sought to ascertain whether Personnel Decisions would seek to challenge the validity or performance of the Development Agreement and whether Personnel Decisions would argue that any then-existing claims were barred by the statute of limitations. Otherwise, Business Planning threatened that Personnel Decisions would not have the right to

> challenge them in court. Aside from the benefits Business Planning received from its offensive use of § 5703(c) of the DUAA, its invocation of that statute caused a material detriment to Personnel Decisions. In reliance on Business Planning's consistent invocation of the DUAA, Personnel Decisions filed suit on a theory unique to the DUAA and researched and prepared several briefs to the court on terms of the DUAA, all for a proceeding with a limited scope.
>
> Similarly, the equities do not favor Business Planning. It had full knowledge of all relevant facts necessary to make a determination of the DUAA's application during the period 2003 to 2007. Its self-interested 180 degree turn is graceless.

(A22-23).

Tellingly, BPS does not challenge that doctrine anywhere in its submission. Nor could it. The estoppel doctrine is well-established. All it requires is proof that BPS changed positions in the litigation to gain an advantage. *See Albertson v. Winner Auto.*, 2004 WL 2435290, *4 (D. Del. Oct. 27, 2004) (citations omitted). BPS cites no case law holding that FAA preemption is an unwaiveable argument, because no such case law exists.

Further, the trial court properly balanced the equities as it is required to do in connection with weighing an award of a preliminary injunction. *See e.g., In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 190 (Del. Ch. 2007). The potential to raise a statute of limitations defense in any subsequent arbitration is not a legal (as opposed to equitable) remedy. It is an affirmative defense, and no more.

BPS cites no authority to establish any contrary proposition, and none exists. More to the point, "[t]he essential relief sought in [this] action was an injunction, exclusive jurisdiction of which is vested in the Court of Chancery." *City of Rehoboth Beach v. Capasso*, 1986 WL 10500, *3 (Del. Ch. Sept. 22, 1986).

In short, the Court of Chancery's application of the estoppel doctrine to prevent BPS from repudiating the DUAA, after it had repeatedly and expressly invoked that very statute, violates no Federal law or policy. The Court acted within its inherent equitable authority, and such authority should not be disturbed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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